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Administrative Code Committee

Biennial Report to the 50th Legislature

December 1986

Montana Legislative Council

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MONTANA LEGISLATIVE COUNCIL
Room 138
State Capitol
Helena, Montana 59620
(406) 444-3064

ADMINISTRATIVE CODE COMMITTEE

A REPORT TO THE 50TH LEGISLATURE

December 1986

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MONTANA LEGISLATIVE COUNCIL
Room 138
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MEMBERSHIP

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Gregory J. Petesch	Director, Legal Services
John MacMaster	Attorney

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PART I

HISTORY, FUNCTION, AND ACTIVITIES OF THE ADMINISTRATIVE CODE COMMITTEE

The Administrative Code Committee is a permanent joint Committee of the Montana Legislature, established in 1975 by Title 5, chapter 14, part 1, MCA. The Committee consists of four members from the House and four members from the Senate, who are appointed in the same manner as standing committees of their respective houses of the Legislature. The chairman of the Committee is selected by the Committee members. During the biennium covered by this report, the staff of the Committee consisted of one staff attorney employed by the Legislative Council, who devoted approximately one-fourth of his time to Committee business. Six other staff lawyers employed by the Council also provided services to the Committee on a part-time basis, reviewing rules of administrative agencies. A Committee secretary performed clerical tasks. Committee meetings were held as often as necessary.

The purpose of the Committee, as reflected in the statutes defining its powers and duties, is to review rules proposed and adopted by administrative agencies and filed with the Office of the Secretary of State under the provisions of the Montana Administrative Procedure Act (MAPA), and to generally oversee compliance with the requirements of MAPA. While this authority includes the ability to oversee compliance with those parts of Title 2, Chapter 4, MCA, concerning contested case procedure and judicial review of contested cases, by far the largest amount of the Committee's time over the biennium has been devoted to

aspects of the rulemaking process itself. The Committee believes this emphasis is appropriate; not only are contested case procedures somewhat beyond the authority of the Committee (with the exception of recommended amendments to statutes), but it has been the intention of the Committee to serve both as a body to provide routine review of executive agency rules and as a forum to which persons with complaints concerning executive branch rules and executive agency action founded on those rules may turn for less expensive and more timely solutions than legal challenges to agency authority. For this reason, the Committee has sought to publicize its functions in the Montana Administrative Register (MAR), rulemaking hearings, and other forums.

It cannot be too strongly emphasized that MAPA does not grant substantive rulemaking authority to any agency. See Appendix C of this report.

Since publication of the Committee's Biennial Report to the Forty-Ninth Legislature in December of 1984, the Committee has held eight meetings to review rules published in the Montana Administrative Register, hear testimony, consider legislation, and conduct studies on specific topics. A schedule of Committee meetings and a summary of the matters discussed follows:

April 3, 1985, meeting

Election of Committee Chairman and Vice-Chairman; beer and wine wholesalers' request for an economic impact statement on a Department of Revenue rule; Public Service Commission emergency rule; 1984 MAR Issues 21 through 24; and 1985 MAR Issues 1 through 4.

June 29, 1985, meeting

Beer and wine wholesalers' request for an economic impact statement on a Department of Revenue rule; filing fees for agricultural liens; emergency rules; 1985 MAR Issues 5 through 11; and instructions to staff on interim projects.

September 6, 1985, meeting

Insurance Division emergency rules; fees for MAR filings and subscriptions; local contested case procedure; fee justifications; report from Montana Economic Development Board; unisex insurance rules; 1985 MAR Issues 12 through 15.

November 22, 1985, meeting

Rules relating to receipts from political action committees, campaign contributions and expenditures, age discrimination in housing, and mid-term insurance policy cancellations and rate increases; emergency rules on AIDS reports; assumption of county welfare by the Department of Social and Rehabilitation Services; report of the Montana Economic Development Board; and 1985 MAR Issues 16 through 21.

June 14, 1986, meeting

Fiscal notes on rules with a financial impact on school districts; voter polling place accessibility rules; woodburning stove air quality rules update; amendment of an emergency rule by another emergency rule; retroactive applicability of an emergency rule; letter to the Attorney General requesting his assistance in

drafting a model local government contested case procedure; Committee proposals for bills relating to general oversight of the executive branch by the Committee and to review of all of a department's rules by a person in the department; problems with workers' compensation; dispute between the Water Court and the Department of Natural Resources and Conservation over department rules implementing the water adjudication process; 1985 MAR Issues 22 through 24; and 1986 MAR Issues 1 through 9.

August 11, 1986, meeting

Hard Rock Mining Impact Board rule requiring economic impact plans and tax prepayments to take into account persons other than workers and their families who come into the affected area as a result of the mining development; pooled sick leave fund rules; legislation proposed by the Professional and Occupational Licensing Bureau; letter from the Attorney General declining to assist the Committee in drafting model local government contested case procedure rules; problems with workers' compensation; Water Court order prohibiting the Department of Natural Resources and Conservation from adopting water adjudication rules under the Montana Administrative Procedure Act; and 1986 MAR Issues 9 through 12.

October 24, 1986, meeting

Pooled sick leave fund rules; Hard Rock Mining Impact Board rule requiring economic impact plans and tax prepayments to take into account persons other than workers and their families who come into the affected area as a result of the mining development; problems

with workers' compensation; Board of Realty continuing education requirements; Board of Psychologists rule requiring a person with a doctoral degree from a private institution to have written a thesis, even though the same requirement does not apply to a person with a doctoral degree from a public institution; update of dispute between the Water Court and the Department of Natural Resources and Conservation; air quality rules update; Committee bills relating to rules; and 1986 MAR Issues 13 through 17.

December 12, 1986, meeting

Update on hazardous waste management rules; local government audit rules; sex equity in education rules; problems with workers' compensation; LC 98, the professional and occupational licensing board sunrise and consolidation bill; committee bills relating to rules; and 1986 MAR Issue 18.

PART II

THE NEED FOR THE MONTANA ADMINISTRATIVE PROCEDURE ACT AND LEGISLATIVE OVERSIGHT OF ADMINISTRATIVE RULEMAKING

In Montana, as in most states, the state constitution provides that the lawmaking function is a function of the Legislature and declares that certain procedures must be used in order to enact laws.[1] Historically, it is also a recognized principle of state law that the Legislature may delegate the power to enact rules to the executive branch, comprised of agencies that are themselves usually created by the Legislature.[2] This delegation of legislative authority to enact rules that are binding as law has its support not only in law but also in reason, for the Legislature, being a part-time body and lacking expertise in the many varied purposes of state government, does not have the time, knowledge, and resources to adopt as statutory law the many detailed provisions of the law that are needed to implement the statutes the Legislature enacts. To facilitate the administration of legislation, the Legislature authorizes rules, which must be adopted pursuant to the requirements of the Montana Administrative Procedure Act.

Because of the definition of "agency" contained in the Act, the Act applies to most state agencies.[3] By its application, the Act has standardized many functions of administrative agencies, the most important of which may be the rulemaking function delegated by the Legislature. As a result, persons dealing with state agencies need not obtain information concerning rulemaking and copies of agency rules solely from the

agencies themselves, nor must they distinguish between many different forms and styles of agency regulations. Furthermore, there is no longer a risk that an agency may have adopted rules in a manner unknown and undiscoverable by the general public. Under the Act, all proposed and adopted rules of every agency covered by the Act must be printed in the Montana Administrative Register, which is published twice monthly by the Secretary of State, interested persons must be given an opportunity to comment on proposed rules, and adopted rules must be published in the Administrative Rules of Montana. Much good has resulted from these and other provisions of the Act. The purpose and effect of the Act, however, has sometimes been misconstrued. As the Administrative Code Committee noted in an earlier report to the Legislature,[4] the Act itself has sometimes been blamed for the proliferation of agency rules, and its repeal has sometimes been advocated as the cure to prevent the adoption of those rules. But as the Committee also noted in that previous report,[5] the Act does not grant rulemaking authority to state agencies as a section of the Act plainly states.[6] Rulemaking authority has instead been granted by the Legislature in individual sections of the law scattered throughout the Montana Code Annotated. A typical grant of rulemaking authority, section 37-32-201, MCA, states, with respect to the Board of Cosmetologists:

> 37-32-201. Rulemaking power. (1) The board may adopt rules in accordance with the Montana Administrative Procedure Act to implement this chapter and to properly regulate this profession.

The number of grants of rulemaking authority may surprise some people. Ten years ago, the Committee

report listed almost 350 statutory sections delegating authority for agencies to adopt administrative rules and noted that the total number of statutory sections granting rulemaking authority was probably even higher.[7] As the 1976 Committee report also found, the grants of rulemaking authority that are enacted by the Legislature are often worded in such a manner as to provide little detail and guidance to executive agencies on the manner in which rulemaking authority is to be exercised.[8] While this concern has been the subject of Committee reports to the Legislature, containing findings, cautionary remarks and recommended legislation, it is worth noting that rulemaking grants must of necessity continue to be enacted. By way of a solution to the problem of loosely worded and hastily considered delegations of rulemaking authority, the 1976 Committee report recommended and the 45th Legislature enacted a law requiring the Legislature to provide in its joint rules a procedure for the adoption of a statement of legislative intent whenever rulemaking authority is delegated.[9] Chapter 11 of the Joint Rules of the Legislature and the resulting statements of legislative intent have been successfully used by the Committee and its staff in guiding the agency rulemaking process.

Since its creation in 1975, the Committee has sponsored other legislation to help the Legislature exert more influence over the rulemaking process.

Statements of legislative intent, hearings on agency rules, and similar "mechanical" devices, while certainly helpful, cannot be relied upon in all instances to assure a legal implementation of legislative intention by the agency, much less the "best",

most practical, or least expensive implementation of legislative intent. Whether because of oversight, inaccurate use of language, limited time allowed for legislative or committee action, or simple inability to foresee possible legal or economic consequences, it appears almost impossible as a practical matter to frame grants of rulemaking authority and the statutes implemented by them in a manner acceptable to all interests. Hindsight must therefore be used, and legislative oversight becomes a practical necessity.

PART III

REVIEW OF AGENCY RULES

The Administrative Code Committee is required by section 2-4-402, MCA, to review "all proposed rules filed with the secretary of state". The review of rules by the Committee is conducted primarily to determine compliance with statutory requisites for valid rules. Under section 2-4-305, MCA, no rule is effective unless:

(1) each substantive rule adopted is within the scope of authority conferred by the Legislature and in accordance with other statutory standards;

(2) the rule is consistent with the implemented statute and reasonably necessary to carry out the purpose of the statute; and

(3) the rule substantially complies with the requirements of the law relating to the procedure for adoption (e.g., notice, hearing, and submission of comments on the rule).

To determine whether a rule complies with these statutory standards the Committee must review the statute authorizing rulemaking, the substantive law implemented by the rule, and the procedure used by the agency to propose or adopt the rule. The Committee reviews the rule for such additional considerations as clarity and economic impact.

The review begins with a review by a staff lawyer for substantive and procedural compliance with the statutes. If an error in any proposed or adopted rule is discovered, the reviewing lawyer notifies the agency concerned and recommends a solution. If the agency agrees with the staff comments and agrees to implement the proposed remedy, the staff objection and agency response are noted in a written summary of current rules that is distributed to the Committee. The staff lawyer conducts a follow-up as necessary to determine subsequent agency compliance. If the agency disagrees with the staff comment or proposed solution and the staff objection is of a substantive nature, the problem is explained in the attorney's summary and orally brought to the attention of the Committee for action at its next meeting, and the agency is given an opportunity to present its views. The Committee then may act on the matter by vote or Committee consensus.

If the agency was not represented at the meeting, it is notified of the Committee's recommendation, request, or objection. Follow-up is then conducted as necessary by the Committee staff to determine agency compliance.

Objections generally fall into three major categories:

(1) The agency lacks statutory authority for the proposed rule, the rule improperly interprets the language of the statute being implemented, the rule is unnecessary to give effect to the statute implemented, and the rule has not been adopted in substantial compliance with the procedural requirements of the Montana Administrative Procedure Act.

(2) A second category of objections raised by the staff relates to such matters as any improper citation to the authorizing statute or the statute implemented (although both types of statutes may in fact exist), improper repetition of statutory language in rules, and ambiguous language. Objections of this type raised by the staff may be brought to the Committee's attention if the agency disagrees with the objection or recommendation of the staff, depending upon the severity of the violation and the nature of the agency response.

(3) A third category includes such matters as grammatical, spelling, and typing errors, which are usually brought to the attention of the agency so that they may be corrected. They are rarely brought to the attention of the Committee.

In the great majority of cases in which staff objections were raised to rulemaking errors, the agencies agreed and remedied the staff objection by cancelling the rulemaking proceeding altogether, cancelling the rulemaking proceeding and rule objected to and renoticing the rule in a different form, amending the proposed rule in the subsequent notice of adoption, or correcting minor errors in the ARM replacement pages. In most cases of Committee objections, the agencies involved responded positively to the Committee objection.

During the biennium the staff lawyers' combined time spent reviewing rules was approximately 17 hours each week.

PART IV

REVIEW OF RULES ADOPTED PRIOR TO CREATION OF COMMITTEE

Chapter 64, Laws of 1983, requires the Administrative Code Committee to review all administrative rules adopted prior to the creation of the Administrative Code Committee for compliance with section 2-4-305, MCA. The Committee identified approximately 2800 rules falling into this category. The staff has begun this project.

Chapter 64 requires that prior to January 1, 1987, the Committee must "prepare a report of its activities and any recommendations to be submitted to the legislature." This Part IV constitutes that report.

The staff is in the process of reviewing the rules. This lengthy process was set back for the whole of 1986 because of staff involvement prior to and during the March and June 1986 Special Sessions and making up the lost time spent on such work rather than on normal interim duties. A report will also be made to the 51st Legislature, which should be the final report on the Committee's Chapter 64 activities and recommendations.

The review conducted by the staff up to this point indicates that there has been virtually no agency compliance with section 2-4-314, MCA, which requires agencies to review their rules to determine whether they need modification or repeal.

END NOTES

[1]Article V, §1, Montana Constitution; Article V, §11, Montana Constitution.

[2]See, for example, Chicago, M & St. P. RY Co. v. Board of Railroad Comm'rs., 76 Mont. 305, 247 P. 162 (1926).

[3]Sections 2-4-102(2) and 2-3-102, MCA; certain exceptions exist, such as the Governor and the Board of Regents.

[4]Report of the Administrative Code Committee to the 45th Montana Legislature (December 1976, p. 5).

[5]The 1976 Report of the Administrative Code Committee to the 45th Legislature reads in part:

> ...the committee has noted a widespread misunderstanding that the APA is the cause of rules. To clear up any confusion on this issue, the committee has proposed language from the California statutes declaring that the APA can never be used as authority to adopt a substantive rule, and that rule [sic] adopted under authority of another statute must be reasonably necessary to effectuate the purpose of that other statute.

[6]Section 2-4-301, MCA, now provides as follows:

> (1) Except as provided in part 2 [which applies only to organizational and procedural rules], nothing in this chapter confers authority upon or augments the authority of any agency to adopt, administer, or enforce any rule.

[7]Report of the Administrative Code Committee to the 45th Montana Legislature (December 1976), pp. 5-7.

[8]Ibid., p. 9.

[9]Section 5-4-404, MCA.

APPENDIX A

MEMORANDUM ON RULES CITING EXTENSIONS OF RULEMAKING AUTHORITY

Montana Legislative Council
State Capitol
Helena, MT. 59620
(406) 444-3064

May 30, 1986

TO: Attorneys

FROM: John MacMaster

RE: Citing Extensions of Rulemaking Authority in the Authority Cites of Rules Implementing Code Sections Enacted or Amended After October 1, 1983

See 2-4-305(3) and 5-4-402(3), MCA.

Each rule must state the code section(s) implemented by that rule. For each new rule or rule amendment look at the implemented code sections cited in the history at the end of the rule. If any of those sections of the code were adopted or amended after October 1, 1983, look at the Session Law adopting or amending the code section. If that Session Law has a section stating that any existing authority to make rules on the subject of that Session Law is extended to the provisions of that Session Law, then cite that section of the Session Law as part of the authority for your new rule or rule amendment. The Session Law's extension of authority section will probably be near the end of the Session Law and be entitled "Extension of authority". This is all there is to it; however, the following comments are in order:

-- At the time the Session Law adopted or amended the code section the new rule or rule amendment is implementing there should have been an existing code

section granting authority to adopt rules to implement the "title", "chapter", or "part" of the code that the code section in which the rule is implementing appears. Under 5-4-402(3), MCA, it is that rulemaking authority section that already existed that is extended by the Session Law to the provisions of the Session Law.

-- If the Session Law does not have an extension of authority it may be for a number of reasons. Perhaps there was no then-existing grant of rulemaking authority to extend. Perhaps the grant of rulemaking authority is itself in the same Session Law. If it is, an extension of that authority is not needed in that Session Law. Perhaps the bill's drafter inadvertently left out a needed extension of rulemaking authority.

-- An extension of authority section in a Session Law is not, standing alone, authority for a rule. Nor is it the same as a code section granting rulemaking authority. The extension of authority extends the grant of rulemaking authority in the code section to the provisions of the Session Law containing the extension of authority when those Session Law provisions adopt or amend code sections that are codified and appear in the title, chapter, or part that contains the code section granting rulemaking authority.

-- If a new rule or rule amendment cites as implemented a code section that is (and contains no other provisions than) a grant of rulemaking authority, and that code section was amended after October 1, 1983, you do not have to look for or cite a Session Law extension of authority, even if the Session Law that amended the

code section implemented contains an extension of authority. The reason is that in this case the grant of rulemaking authority is itself amended and the Legislature actually granted additional rulemaking authority rather than extending existing authority. Since the section contains no provisions other than a grant of rulemaking authority any amendment of the section is obviously intended to be a grant of rulemaking authority and the intended purpose of 5-4-402(3), MCA, does not apply. That purpose is that the Legislature, when it adopts new law in an area containing rulemaking authority, makes a conscious choice whether to extend the rulemaking authority to the new law. However, if the code section contains provisions other than a grant of rulemaking authority and one of those provisions was inserted or amended after October 1, 1983, an extension of authority must be cited in a rule implementing the section.

-- If a new rule or rule amendment cites as implemented a code section granting rulemaking authority (whether or not the section also contains other provisions) an extension of authority in the Session Law that adopted the section need not be cited in a rule implementing the section. It would make no sense to say that the same Session Law that adopted the grant of rulemaking authority had to extend that authority to the authority grant.

-- When a code section states that the agency may adopt rules relating to a stated laundry list of items those items are part of the grant of rulemaking authority and amendment of them is also part of the grant of rulemaking authority. They are not provisions other than a grant of rulemaking authority.

6150a:JM1EE:jj

APPENDIX B

MEMORANDUM ON COMMITTEE'S POWERS

ADMINISTRATIVE CODE COMMITTEE'S POWERS

Prepared for the Administrative Code Committee

By John MacMaster
Staff Attorney

Montana Legislative Council
October 1986

This legal memo was prepared at the request of Representative Gary Spaeth, Chairman of the Administrative Code Committee. It sets forth the various powers of the Committee under the Montana Administrative Procedure Act (MAPA). The Committee may:

(1) Review the incidence and conduct of administrative proceedings under MAPA; 2-4-402 (3)(e), MCA.

(2) Review all proposed rules, though Department of Revenue proposals may only be reviewed for procedural compliance with MAPA; 2-4-402 (1) and (2), MCA.

(3) Require an agency proposing a rule to hold a hearing on the rule; 2-4-402 (3)(c), MCA.

(4) Submit oral and written testimony at an agency's rulemaking hearing; 2-4-402 (3)(b), MCA.

(5) Require an agency to publish the full or partial text of rule material adopted and incorporated by reference to the material; 2-4-307 (4), MCA.

(6) Obtain an agency's rulemaking records for the purpose of reviewing compliance with 2-4-305, MCA; 2-4-402 (3)(a), MCA.

(7) Require an agency to prepare an economic impact statement regarding a rule proposal. As an alternative, the Committee may by contract prepare its own statement. Notice of the statement and of where a copy can be obtained is published in the Montana Administrative Register; 2-4-405, MCA.

(8) Petition an agency for the adoption, amendment, or repeal of a rule; 2-4-315, MCA.

(9) Make a written recommendation to an agency for the adoption, amendment, or repeal of a rule; 2-4-402 (3)(b), MCA.

(10) Make a written objection to an agency regarding a proposed or adopted rule. The agency must respond in writing. If the Committee does not then withdraw or substantially modify its objection the Committee may require publication of the objection next to the rule in both the Montana Administrative Register and the Administrative Rules of Montana; 2-4-406, MCA.

(11) Poll the Legislature to determine whether a proposed rule is consistent with the Legislature's intent; 2-4-403, MCA. See also 2-4-404, MCA.

(12) Make a recommendation to the Legislature regarding an agency's grant of rulemaking authority. For example, the Committee could recommend that the statute granting rulemaking authority be amended or repealed; 2-4-314, MCA.

(13) Petition an agency for a declaratory ruling on the applicability of an agency rule. The ruling is subject to judicial review, including review at the Committee's request; 2-4-501, MCA.

(14) Seek judicial review of an emergency rule; 2-4-303, MCA.

(15) Institute, intervene in, or otherwise participate in proceedings involving MAPA (including an action to change or repeal a rule) in the state and federal courts and administrative agencies; 2-4-402 (3)(d), MCA.

(16) Require an agency to give the Committee copies of documents filed in a proceeding involving the interpretation of MAPA or an agency rule; 2-4-410, MCA.

(17) Require an agency to review its rules biennially to determine if rules should be adopted, amended, or repealed; 2-4-314 (1), MCA. That section requires each agency to do this. The Committee can use various powers set forth in this legal memo, paragraph (16) for example, to force an agency to carry out the review.

In addition to the above powers under MAPA, the Committee may remind an agency that the Legislature holds the power of the purse and may not look favorably upon an agency in the next regular session if the agency exceeds its rulemaking authority or plays fast and loose with either that authority or the legislative intent behind a statute. The Committee may also, under its inherent powers as a legislative committee, draft and introduce legislation relating to MAPA; an agency's grant of rulemaking authority; adoption, amendment, or repeal of a rule; or other matters relating to rulemaking.

MACC-6302/JM/JM1

APPENDIX C

LETTER TO THE INDEPENDENT RECORD NEWSPAPER RELATING TO PURPOSES OF MAPA

HOUSE MEMBERS
GARY SPAETH
CHAIRMAN
KELLY ADDY
LES KITSELMAN
JAMES M. SCHULTZ

MONTANA LEGISLATURE

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PETE STORY

ROOM 138
STATE CAPITOL
HELENA 59620
(406) 444-3064

ADMINISTRATIVE CODE COMMITTEE

October 28, 1986

Michael Voeller
Editorial Page Editor
Independent Record
317 Allen
Helena, Montana 59601

Dear Mr. Voeller:

I have read the Independent Record's October 16 editorial entitled "Mining board is off base". The editorial begins: "Once again a state board has used the pernicious Administrative Procedures Act to place one more burden on the all but overburdened mining industry". The sixth paragraph of the editoral states that the Hard Rock Mining Impact Board accomplished the adoption of rules "by administrative fiat through the Administrative Procedures Act".

The Montana Administrative Procedure Act (there is no "s" at the end of "Procedure") merely states the procedure that an agency must follow when engaging in rulemaking. The act is referred to as "MAPA". The act provides in 2-4-301, MCA, that except as provided in part 2 of the act "nothing in this chapter confers authority upon or augments the authority of any state agency to adopt, administer, or enforce any rule." Part 2 only gives an agency authority to adopt rules describing its organization and how it operates. There is no grant of authority in MAPA to agencies to adopt substantive rules that become law. Before an agency has authority to adopt rules in a particular area of law the Legislature must pass a law specifically granting rulemaking authority to that agency for that particular area of law. The agency would then have authority to adopt rules even if MAPA did not exist.

It is a common, and false, misconception that rulemaking authority comes from MAPA and that if MAPA were repealed the authority to adopt rules would cease to exist. The executive branch agencies had authority to adopt rules before MAPA was enacted. Prior to enactment of MAPA, the procedures an agency had to use when going through the rulemaking process were essentially laid down by the courts. This resulted in a variety of often confusing and contradictory court rulings relating to notice that an agency intended to adopt certain stated rules, public hearings and opportunity to be heard, and various other procedures and requirements of the type now found in MAPA. The MAPA is basically a placement of these types of court rulings in a statute, along with other requirements that the Legislature wished agencies to follow. The MAPA brings together in one place a coherent and all-encompassing process to be followed when an agency that has been granted rulemaking authority by some statute other than MAPA wishes to adopt administrative rules.

Far from being itself "pernicious", MAPA helps to prevent the pernicious abuse of rulemaking authority by placing many restrictions in the path of rulemaking agencies, restrictions the agencies often resent, complain about, and neglect to follow. One purpose of MAPA is to ensure that its provisions <u>are</u> followed. The Administrative Code Committee was given the task of ensuring that agencies follow MAPA.

In view of the misconceptions that so many people have about MAPA, I would appreciate it if you would publish this letter in your letters to the editor column.

Sincerely yours,

Representative Gary Spaeth
Chairman, Administrative Code Committee

LEditor-6301/JM/JM1

APPENDIX D

LETTER TO HUMAN RIGHTS DIVISION RELATING TO DELAYED EFFECTIVE DATE FOR A NEW RULE

HOUSE MEMBERS
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KELLY ADDY
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ROOM 138
STATE CAPITOL
HELENA 59620
(406) 444 3064

ADMINISTRATIVE CODE COMMITTEE

September 30, 1985

Ms. Anne MacIntyre, Administrator
Human Rights Division
Department of Labor and Industry
Room C-317, Cogswell Building
Helena MT 59620

Dear Ms. MacIntyre:

You have requested an opinion from the Administrative Code Committee as to whether the Human Rights Commission may apply ARM 24.9.1107 on a case-by-case basis to complaints alleging discrimination in housing. The adopted rule provides that the rule is effective July 1, 1987. The comments submitted with the notice of adoption indicate that the delayed effective date was added to give the Legislature an opportunity to consider the issue. Section 2-4-306(4), of the Montana Administrative Procedure Act, expressly authorizes an agency to specify a delayed effective date for a rule.

There are no Montana cases construing the result of a delayed effective date for a rule. However, generally the same rules of construction and interpretation which apply to statutes, govern the construction and interpretation of rules and regulations of administrative agencies, Miller v. U.S., 294 U.S. 435, 55 S.Ct. 440, 79 L.Ed. 977 (1935).

Section 33.07 of Sutherland, Statutory Construction (4th ed.), provides that the purpose of a future effective date is to inform persons of the provisions of a statute before it becomes effective, in order that they may take steps to protect their rights and discharge their obligations.

In Montana, the cases of Peterson v. Livestock Commission, 120 M 140, 181 P.2d 152 (1947), St. v. No. Pac. Ry. Co., 36 M 582, 93 P. 945 (1907), and Butler v. Local 2033 Am. Fed. of St., County, and Mun. Employees, 186 M 28, 606 P.2d 141 (1980), all provide that the general rule is that a statute speaks of the time it takes effect and not as of the time it was passed. The Butler decision applied this rule to the effective date of a municipal charter.

In Johnson v. Alexis, 199 Cal. Rptr. 909 (Cal. App. 3 Dist. 1984), the Court quoted from People v. Righthouse, 10 Cal.2d 86, 72 P.2d 867 (1937), "It has been uniformly held in this state that a statute has no force whatever until it goes into effect pursuant to the law relating to legislative enactments. It speaks from the date it takes effect and not before. Until that time it is not a law and has no force for any purpose." (Emphasis in original.)

Applying this rationale to the issue at hand, it is clear that the rule promulgated by the Human Rights Commission to be effective July 1, 1987, has no force for any purpose until that date. To apply the rule to complaints brought before July 1, 1987, would be a violation of the rule itself.

I hope that this is of aid to you.

Sincerely,

Gregory J. Petesch
Director of Legal Services and
Attorney to the Committee

GJP:rm:ACCRLM:5274a

cc: Administrative Code Committee

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CHAIRMAN
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MONTANA LEGISLATURE

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PETE STORY

ROOM 138
STATE CAPITOL
HELENA 59620
(406) 444-3064

July 1, 1985

TO: All State Agencies

FROM: Administrative Code Committee

RE: Emergency Rules

The Administrative Code Committee is concerned about the increasing use of emergency rulemaking and the statements of reasons filed to justify emergencies. This memorandum will set forth the Committee's construction of 2-4-303, MCA, which authorizes emergency rules.

The key phrase in 2-4-303, MCA, is "an imminent peril to the public health, safety, or welfare". Webster's New World Dictionary, second college edition, defines "imminent" as follows:

> imminent - to project over, threaten, likely to happen without delay; impending; threatening; said of danger, evil, misfortune, etc.

"Peril" is defined as:

> peril - exposure to harm or injury; danger, jeopardy; something that may cause harm or injury; to expose to danger; jeopardize, imperil.

Because the definition of "person" in 2-4-102(8), MCA, includes an agency or a public organization, the Committee feels that "public" as used in 2-4-303, MCA, means the "general public" or the "public at large".

The Committee therefore feels that "an imminent peril to the public health, safety, or welfare" means an impending danger to the general public. This connotes something the agency could not reasonably foresee within the timeframe of normal rulemaking (approximately 2 months under MAPA).

If an agency determines that the public health, safety, or welfare is threatened, it should show how the public health, safety, or welfare will be irretrievably diminished within the imminent time period unless the emergency rule is adopted.

Agencies should also be aware that 2-4-303, MCA, provides for abbreviated notice and hearing when practicable, in order that the purpose of MAPA will not be circumvented. The Committee feels that this would alleviate the harm of holding no hearing, but does not endorse abbreviated hearings as it hopes agencies will allow full public input whenever feasible.

The Committee hopes agencies will police themselves carefully in this matter. As one of its interim projects, the Committee intends to review the incidence and record on emergency rulemaking for consideration in making its recommendations to the 1987 Legislature concerning the Administrative Procedure Act. The Committee would encourage agencies to submit proposed emergency rules, even in conceptual form, to the Committee prior to filing with the Secretary of State in order that agencies may receive Committee input on the emergency situation, and to promote better relations between the Committee and the agencies.

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APPENDIX F

RULE REVIEW RELATING TO RETROACTIVE APPLICABILITY CLAUSE IN A RULE ADOPTION

Emergency Rules

Department of Social and Rehabilitation Services

Reimbursement for Nutrient Solutions Provided to Medicaid Patients. Amends ARM 46.12.1205. On March 3, 1986, the Department of Social and Rehabilitation Services adopted an emergency amendment to ARM 46.12.1205. The amendment allows the Department to reimburse long-term care providers for the cost of administering nutrient solutions to Medicaid patients who cannot take food orally. The rule, which provides for reimbursement for other items, does not include reimbursement for nutrient solutions, and since the solutions are necessary to keep patients alive, the care providers have been providing them. However, they hesitate to continue to do so at their own expense and without reimbursement. For the Department to be itself reimbursed through federal funding, it is necessary to make the rule effective by March 31, 1986. The Medicaid patients are thus in jeopardy of losing their life-sustaining solutions. The authority is 53-6-113, MCA, and 53-6-141, MCA, is implemented.

Comment: The Department's staff admitted to ACC staff that there was ample time (which has now passed) to adopt the amendment through the normal procedure, but that through a combination of oversight and Department staff changes the opportunity was unfortunately lost. The fact remains that as of the time the rule was adopted an emergency existed, and Medicaid patients should not bear the brunt of the Department's mistake. The Department was advised that hopefully such situations would be avoided in the future.

The rule becomes effective March 14, 1986. It will apply to allow reimbursement after March 13, 1986, for nutrient solutions provided since January 1, 1986. Thus the effective date is not retroactive, but the application is. Staff cannot recall such a situation regarding a rule, though this type of thing is occasionally done with statutes passed. For example, see the Chapter Compiler's Comments to Title 39, Ch. 30, MCA, (repeal of former law effective December 20, 1983, but applying retroactively to bar certain claims under the former law). Staff feels that retroactive applications like this should be discouraged in rulemaking, particularly emergency rulemaking, but that such applications are valid. Case notes from Illinois and Oregon cases on the subject follow. No cases to the contrary were found.

In determining whether an agency rule or regulation may be applied retroactively, test to be applied is whether case is one of first impression, whether regulation represents an abrupt departure from well-established practice, extent to which plaintiffs relied on former regulation, and degree of burden imposed on party against whom application is sought; however, even where inequities appear in retroactive application of rule or regulation, it must be considered whether there are significant statutory interests involved which counterbalance any hardship to complaining party. Shapiro v. Regional Bd. of School Trustees of Cook County, App. 1 Dist. 1983, 71 Ill. Dec. 915, 451 N.E.2d 1282, 116 Ill. App.3d 397.

Administrative rules may be applied retroactively if that is reasonable under the circumstances; however, retroactive application of a rule that does not by its terms provide for retroactivity is not favored. Guerrero v. Adult and Family Services Div., 1984, 676 P.2d 928, 67 Or.App 119.

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APPENDIX G

PROPOSED LEGISLATION
(LC 1, LC 83, LC 141)

____ _____ BILL NO. _____

INTRODUCED BY _____

BY REQUEST OF THE ADMINISTRATIVE CODE COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT AUTHORIZING THE ADOPTION OF TEMPORARY RULES TO IMPLEMENT STATUTES WITH EARLY EFFECTIVE DATES; DEFINING PUBLIC WELFARE FOR PURPOSES OF ADOPTING EMERGENCY RULES; AMENDING SECTIONS 2-4-303 AND 2-4-306, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 2-4-303, MCA, is amended to read:

"2-4-303. Emergency or temporary rules. (1) If an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule upon fewer than 30 days' notice and states in writing its reasons for that finding, it may proceed, without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, to adopt an emergency rule. The rule may be effective for a period not longer than 120 days, but the adoption of an identical rule under 2-4-302 is not precluded.

~~(2)~~ The sufficiency of the reasons for a finding of imminent peril to the public health, safety, or welfare is subject to judicial review. As used in this subsection, public welfare means the well-being of the public at large. Public welfare includes order, morals, economic interests, and public convenience.

(2) A statute enacted or amended to be effective prior to October 1 of the year of enactment or amendment may be implemented by a temporary administrative rule without prior notice or hearing or upon any abbreviated notice or hearing that the agency finds practicable. The temporary rule is effective until October 1 of the year of adoption. The adoption of an identical rule under 2-4-302 is not precluded during the period the temporary rule is effective."

Section 2. Section 2-4-306, MCA, is amended to read:

"2-4-306. Filing, format, and effective date -- dissemination of emergency rules. (1) Each agency shall file with the secretary of state a copy of each rule adopted by it.

(2) The secretary of state may prescribe a format, style, and arrangement for notices and rules which are filed pursuant to this chapter and may refuse to accept the filing of any notice or rule that is not in compliance therewith. He shall keep and maintain a permanent register of all notices and rules filed, including superseded and repealed rules, which shall be open to public inspection and shall provide copies of any notice or rule upon request of any person. Unless otherwise provided by statute, the secretary

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of state may require the payment of the cost of providing such copies.

(3) In the event that the administrative code committee has conducted a poll of the legislature in accordance with 2-4-403 or the revenue oversight committee has conducted a poll in accordance with 5-18-109, the results of the poll shall be published with the rule.

(4) Each rule shall become effective after publication in the register as provided in 2-4-312, except that:

(a) if a later date is required by statute or specified in the rule, the later date shall be the effective date;

(b) subject to applicable constitutional or statutory provisions~~,~~:

(i) a temporary rule is effective immediately upon filing with the secretary of state or at a stated date following publication in the register; and

(ii) an emergency rule shall become effective immediately upon filing with the secretary of state or at a stated date following publication in the register if the agency finds that this effective date is necessary because of imminent peril to the public health, safety, or welfare. The agency's finding and a brief statement of reasons therefor shall be filed with the rule. The agency shall take appropriate measures to make emergency rules known to every

person who may be affected by them."

NEW SECTION. Section 3. Effective date. This act is effective on passage and approval.

-End-

____ _____ BILL NO. _____

INTRODUCED BY _____

BY REQUEST OF THE ADMINISTRATIVE CODE COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING EACH DEPARTMENT HEAD TO APPOINT A QUALIFIED PERSON WITHIN THE DEPARTMENT TO REVIEW EACH DEPARTMENTAL ADMINISTRATIVE RULE NOTICE FOR COMPLIANCE WITH THE MONTANA ADMINISTRATIVE PROCEDURE ACT BEFORE IT IS FILED WITH THE SECRETARY OF STATE; AND PROVIDING AN EFFECTIVE DATE AND AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Departmental review of rule notices. (1) The head of each department of the executive branch shall appoint an existing attorney, paralegal, or other qualified person from that department to review each departmental rule proposal notice, adoption notice, or other notice relating to administrative rulemaking.

(2) The person appointed under subsection (1) shall review each notice by any division, bureau, or other unit of the department, including units attached to the department for administrative purposes only under 2-15-121, for compliance with this chapter before the notice is filed with the secretary of state. The reviewer shall pay particular

attention to 2-4-302 and 2-4-305. The review must include but is not limited to consideration of:

(a) the adequacy of the rationale for the intended action and whether the intended action is reasonably necessary to effectuate the purpose of the code section or sections implemented;

(b) whether the proper statutory authority for the rule is cited;

(c) whether the citation of the code section or sections implemented is correct; and

(d) whether the intended action is contrary to the code section or sections implemented or to other law.

Section 2. Codification instruction. Section 1 is intended to be codified as an integral part of Title 2, chapter 4, and the provisions of Title 2, chapter 4, apply to section 1.

Section 3. Effective date -- applicability. This act is effective July 1, 1987, and applies to rulemaking notices filed with the secretary of state on or after August 1, 1987.

-End-

_____ BILL NO. _____

INTRODUCED BY _____

BY REQUEST OF THE ADMINISTRATIVE CODE COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT TO PROVIDE THAT A HARD-ROCK MINING DEVELOPER'S IMPACT PLAN AND LOCAL TAX PAYMENTS NEED NOT TAKE INTO ACCOUNT PERSONS MOVING INTO THE AREA, OTHER THAN WORKERS AND FAMILIES OF WORKERS CONSTRUCTING AND OPERATING THE MINE; AMENDING SECTIONS 90-6-301 AND 90-6-307, MCA; REPEALING RULE 8.104.203A(1), ADMINISTRATIVE RULES OF MONTANA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 90-6-301, MCA, is amended to read:

"90-6-301. Declaration of necessity and purpose. (1) The large-scale development of mineral deposits in the state causes an influx ~~of people~~ into the development area ~~of the development many times larger than the number of people directly involved in the mining operation~~ of workers and families of workers constructing and operating the development. This influx of people and the corresponding increase in demand for local government facilities and services creates a burden on the local taxpayer. There is a significant lag time between the time when additional facilities and services must be provided and the time when additional tax revenue is available as a result of the increased tax base. In addition, local government units in whatever jurisdiction the development is not located may receive substantial adverse economic impacts without benefit of a major increased tax base in the future. There is therefore a need to provide a system to assist local government units in meeting the initial financial impact of large-scale mineral development.

(2) It is not a purpose of this part to require measurement of the economic impact on local government units of the entry into the area, as a result of the development, of persons other than workers and families of workers constructing and operating the development or to require the developer to help local government units finance the increase in their capital and operating costs caused by the influx into the area of persons other than workers and families of workers constructing and operating the development. However, such impact may be measured and the increased costs financed in any manner mutually agreed upon between the developer and the affected local government units, including the manner set forth in this part."

Section 2. Section 90-6-307, MCA, is amended to read:

"90-6-307. Impact plan to be submitted. (1) After an application for a permit for a large-scale mineral

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development is made under 82-4-335, the person seeking the permit shall submit to the affected counties and the board an impact plan describing the economic impact the large-scale mineral development will have on local government units and shall file proof of such submission to the counties with the board. Whenever an environmental impact statement on the permit application is prepared under 75-1-201, the lead agency shall cooperate to the fullest extent practicable with the affected local government units to eliminate duplication of effort in data collection. The governing bodies of the affected counties shall publish notice of the submission of an impact plan at least once in a newspaper of general circulation in the county. The impact plan shall include:

(a) a timetable for development, including the opening date of the development and the estimated closing date;

(b) the estimated number of ~~persons~~ workers and families of workers constructing and operating the development coming into the impacted area as a result of the development;

(c) the increased capital and operating cost to local government units for providing services which can be expected as a result of the development;

(d) the financial or other assistance the developer will give to local government units to meet the increased

need for services.

(2) For purposes of this part, persons other than workers and families of workers constructing and operating the development are not considered as coming into the area as a result of the development.

~~(2)~~(3) In the impact plan, the developer shall commit itself to pay all of the increased capital and net operating cost to local government units that will be a result of the development, as identified in the impact plan, either from tax prepayments, as provided in 90-6-309, special industrial educational impact bonds, as provided in 90-6-310, or other funds obtained from the developer, and shall provide a time schedule within which it will do so. The plan may provide for funding from other revenue sources or funding mechanisms if the developer guarantees that the amount to be provided from these sources will be paid.

~~(3)~~(4) Upon request of the governing body of an affected unit of local government, the mineral developer, prior to the end of the 90-day review period, shall provide financial or other assistance as necessary to prepare for and evaluate the impact plan. The governing body of the affected county must contract with the developer to obtain the requested financial assistance for each unit of local government within the county. Any disbursements to a unit of local government under this subsection shall be credited

against future tax liabilities, if any.

~~(4)~~ (5) An affected local government unit shall, within 90 days after receipt of the impact plan from the developer, notify the board in writing if that local government unit objects to the impact plan, specifying the reasons why the impact plan is objected to. During the 90-day period, an affected local government unit may petition for one 30-day extension by submitting a written request to the board stating the need and justification for the extension. The board shall grant the extension unless it finds there is no reasonable basis for the request. If no objection is received within the 90-day period or any extension thereof, the impact plan shall be approved by the board.

~~(5)~~ (6) If objections are received from a local government unit, the board shall, within 10 days, notify the developer and forward a copy of the local government unit's objections to the developer. The local government unit and the developer have 30 days, or a longer period if both the local government unit and the developer request an extension, to resolve the objection. If the objections are not resolved, the board shall conduct a hearing on the validity of the objections, which shall be held in the affected county or, if objections are received from local government units in more than one county, shall be held in the county which, in the board's judgment, is more greatly

affected. The provisions of the Montana Administrative Procedure Act shall apply to the conduct of the hearing. The impact plan filed by the developer shall carry no presumption of correctness at the hearing.

~~(6)~~ (7) Following the hearing, the board shall, within 60 days, make findings as to those portions of the impact plan which were objected to and, if appropriate, amend the impact plan accordingly. The findings and impact plan, as amended, shall be served by the board upon all parties. Any local government unit or the developer, if aggrieved by the decision of the board, is entitled to judicial review, as provided by Title 2, chapter 4, part 7, in the district court in and for the judicial district in which the hearing was held.

~~(7)~~ (8) The developer shall, within 30 days of receipt of the approved impact plan, provide the board with a written guarantee that the developer will meet the increased costs of public services and facilities as specified in the approved impact plan and according to the time schedule contained in the approved impact plan.

~~(8)~~ (9) The developer may make payments as specified in the approved impact plan directly to a local government unit or to the board. The governing body of a local government unit receiving payments shall deposit the payments into an impact fund. The developer and the affected governing body

shall each issue to the board written verification of each payment and its intended use in compliance with the impact plan. The board shall deposit payments received from a developer into the hard-rock mining impact account established by 90-6-304.

~~(9)~~(10) The board shall notify the department of state lands of its receipt of the written guarantee of payment and of any failure of the developer to comply with this section.

~~(10)~~(11) Upon receipt of evidence that an affected local government unit identified in the approved impact plan is providing or is preparing to provide an additional service or facility provided for in the approved impact plan, the board shall, if the hard-rock mining impact account is used to deliver payments to the local government unit, pay to that local government unit, in one sum or in parts, the money from the hard-rock mining impact account identified in the plan as the increased cost to the local government unit of providing that public service or facility.

~~(11)~~(12) If it is determined that an objection filed by an affected local government unit under subsection ~~(4)~~(5) or 90-6-311(3) is valid and it results in some remedial order by the board or court of competent jurisdiction, the local government unit shall be awarded and the developer shall pay reasonable costs and attorney fees associated with any

administrative or judicial appeals filed under this section. Any attorney fees and costs awarded shall be in addition to any amounts paid by the developer under this part.

~~(12)~~(13) Upon a determination by the department of state lands that a permittee under 82-4-335 has become or will become a large-scale mineral developer, the permittee may petition the board for a waiver of the impact plan requirement. The board may grant a waiver or conditional waiver of this requirement only if it has provided notice and opportunity for hearing to the permittee and to all affected local government units. The board shall adopt criteria under which a waiver may be granted. A waiver issued by the board may be revoked as provided in the conditional waiver or if the permittee and contractors at the mineral development increase their payrolls from the date of the waiver by 75 or more persons, provided the revocation is requested by an affected local government unit and notice and opportunity for hearing are given to the permittee and all affected local government units. The board shall notify the board of land commissioners of any waiver that has been revoked.

~~(13)~~(14) When a person who holds an operating permit under 82-4-335 and who has filed an impact plan fails to comply with the review and implementation requirements in this part and part 4 of this chapter, the board shall

certify to the board of land commissioners that the failure to comply has occurred and shall certify when a permittee who has previously failed to comply comes into compliance."

NEW SECTION. Section 3. Repealer. Subsection (1) of Rule 8.104.203A, Administrative Rules of Montana, is repealed.

NEW SECTION. Section 4. Extension of authority. Any existing authority of the hard-rock mining impact board to make rules on the subject of the provisions of this act is extended to the provisions of this act.

NEW SECTION. Section 5. Effective date. This act is effective on passage and approval.

-End-

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